

M E M O

To: Justice Sandstrom
Re: Ohio Cas. Ins. Co. v. Clark, Civil No. 980057
From: David O. Lee
Date: May 19, 1998

Oral argument in this case will be heard May 27, 1998.

"Early on January 17, 1996, Daniel Clark shot George Girodengo twice, after finding him in Clark's wife's bedroom. Girodengo died in surgery. Clark was charged with murder. On May 17, 1996, a jury returned a verdict finding Clark not guilty of murder, but guilty of manslaughter." State v. Clark, 1997 ND 199, ¶2, 570 N.W.2d 195.

Clark contended "the trial court erred in instructing the jury on the lesser offense of manslaughter," arguing "'this was an intentional shooting. . . . Unless Clark had some right to intentionally pull the trigger, he was guilty of murder. . . . He was either excused by reason of self defense or he was not. . . . The evidence did not support giving an instruction of manslaughter.'" State v. Clark, at ¶10. We ruled: "The fact a shooting was intentional does not preclude a verdict of manslaughter if the shooting resulted from an unreasonable belief in the necessity of using force: . . . There was evidence of recklessness, and we conclude the trial court did not err in instructing the jury on the offense of manslaughter." Clark, ¶11.

George Girodengo's daughter, Kelly Girodengo, and his mother, Maria Entzel, sued Daniel Clark and his wife, Peggy Clark, for George Girodengo's wrongful death. Against Daniel Clark, the plaintiffs alleged, in part: "As a proximate and direct result of Daniel Clark's careless and negligent discharge of the firearm, George Girodengo died on or about January 17, 1996." Against Peggy Clark, the plaintiffs alleged, in part: "Peggy Clark negligently

misrepresented to George Girodengo the safety of his presence at the Clark residence."

Ohio Casualty Insurance Company sued Daniel Clark, Kelly Girodengo, and Maria Entzel, alleging it had issued an insurance policy to Daniel and Peggy Clark with "a coverage limit of \$300,000 for liability claims against Daniel and/or Peggy Clark." It sought a declaratory judgment stating Daniel Clark's acts are excluded from coverage and it owed no duty to defend or indemnify Daniel in the lawsuit.

Kelly Girodengo and Maria Entzel answered, denying "Daniel Clark's acts were done with the 'intent to cause a loss' or specifically with the intent to cause injury and/or death of the decedent, George Girodengo." Daniel Clark answered and sought dismissal of the action.

The district court ruled:

"The evidence shows that the insurance policy in question unambiguously excludes coverage for injuries 'expected or intended' by the insured. . . . Moreover, North Dakota public policy, . . . prohibits insurance coverage for intentional acts. See N.D.Cent. Code § 9-08-02 and 26.1-32-04. . . .

"The Court finds there is no genuine issue of material fact as to whether Daniel Clark intentionally fired the shots that killed George Girodengo. The facts are undisputed. . . . At the oral argument on this motion, Clark's attorney stated it is still Clark's position that this shooting was a deliberate act of self-defense. . . .

"In response to this undisputed evidence, the defendants raise essentially two arguments. First, the defendants assert that an act taken in self-defense - even though intentional - is exempted from the intentional act exclusion. . . . Moreover, this Court need not speculate what [] our own Supreme Court would rule on this issue, because the jury in Daniel Clark's criminal case has already found that this shooting was not justifiable self defense.

"Second, the Girodengo heirs point to Daniel Clark's testimony in the criminal trial that he could not recall firing the second

shot as raising a genuine issue of material fact as to whether Girodengo's death was the result of an intentional act. On this issue, the Court finds that, whichever gunshot ultimately killed Girodengo, both shots were inextricably linked and part of the same series of events. Since it is undisputed by Clark that he intended to do Girodengo harm by firing a weapon at him at point blank range, it is irrelevant whether he can specifically remember pulling the trigger for the second shot."

The judgment entered declared the insurance company had "no duty to defend or indemnify Daniel Clark in the pending lawsuit for the wrongful death of George Girodengo."

Daniel Clark, Kelly Girodengo, and Maria Entzel filed a joint notice of appeal and a joint brief on appeal.

The appellants contend the allegations of the complaint in the underlying wrongful death action would support recovery under a risk covered by the policy and the trial court erred in looking beyond the allegations of the complaint in that action, which alleged only negligence and did not allege any intentional acts. This court has said, "if the allegations in the claimant's complaint would support a recovery upon a risk covered by the insurer's policy the duty to defend is present." Kyllo v. Northland Chem. Co., 209 N.W.2d 629, 631, Syllabus ¶2 (N.D. 1973). See also Nodak Mut. Ins. Co. v. Heim, 1997 ND 36, ¶11, 559 N.W.2d 846. Question: Does this preclude a trial court from looking beyond the allegations in the complaint in the underlying action, to such things as a policy exclusion for intentional acts or the statement by Daniel Clark's attorney that the shooting was intentional?

Appellants contend genuine issues of material fact exist on the intent of Daniel Clark. The trial court said Daniel Clark's attorney said, in argument to the court, that "it is still Clark's position that this shooting was a deliberate act of self-defense." If true, that undercuts the argument quite a bit. Appellants rely on this sentence from State v. Clark, 1997 ND 199, ¶11, 570 N.W.2d 195: "There was evidence of recklessness, and we conclude the trial court did not err in instructing the jury on the offense of manslaughter." The scope of that language is narrowed by an earlier sentence in the same paragraph: "The fact a shooting was intentional does not preclude a verdict of manslaughter if the shooting resulted from an unreasonable belief in the necessity of using force." Question: Could the trial court properly determine, as a matter of law, that "[t]here is no evidence in this record to

show that Daniel Clark's shooting of Girodengo was anything other than an intentional act"?

Appellants contend there was "no evidence that both discharges of the gun were intentional." However, they were both part of one act, and the trial court is probably right that whether Daniel remembers pulling the trigger the second time is irrelevant.

Appellants contend self-defense is not excluded under the policy. The trial court did not reach the issue because the jury in Daniel Clark's murder trial found the shooting was not in self-defense. Questions: (1) Does the jury verdict preclude self-defense in the underlying case here?; (2) Is the necessity of acting in self-defense "expected or intended by the insured"?

In its complaint, the insurance company relied on an exclusion of acts committed "with the intent to cause a loss." Appellants contend the insurance company cannot rely on any other exclusion. The insurer relies on an exclusion for injury or damage "expected or intended by the insured." Insurer says in its brief at page 13, footnote 3: "It should also be noted that Ohio Casualty inquired at oral argument whether the Court believed a motion to amend the complaint was necessary, and the Court indicated such a motion would be granted 'automatically' in light of the lack of any prejudice." Question" Do we need to look beyond the trial court's finding there was no prejudice flowing from the insurer citing to the wrong policy provision in its declaratory judgment complaint?

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